ORIGINAL SIN: THE USE AND ABUSE OF HISTORY IN *ESPINOZA* AND BEYOND[1]

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INTRODUCTION

"Remember your history, your long and rich history."[2]

"Our present swarms with traces of our past. We are *histories* of ourselves, narratives."[3]

The First Amendment of the Constitution enshrines the principle of religious liberty. Yet, the precise construction of the wall separating church and state remains contested, evident in the unresolved tension between the Establishment and Free Exercise Clauses.[4] The Roberts Court has played an active architect in shaping the doctrine. It has narrowed the universe of possible Establishment Clause violations to either those perpetrated solely by government coercion or those that discriminate between religions for financial benefits while, simultaneously, welcoming Religious Freedom Restoration Act accommodations.[5] Under the Free Exercise Clause, the Roberts Court has weakened the standard articulated by the late Justice Antonin Scalia in *Employment Division v. Smith* – that the First Amendment is not offended when a religious plaintiff is incidentally burdened by a generally applicable provision – by expanding the ways in which a religious

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[2] *Isaiah* 46:9.

[3] CARLO ROVELLI, THE ORDER OF TIME 178 (Allen Lane, 2018).

[4] Locke v. Davey, 540 U.S. 712, 718 (2004). "The Religion Clauses of the First Amendment provide: 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.' These two Clauses, the Establishment Clause and the Free Exercise Clause, are frequently in tension."

[5] Prof. Jeremy Kessler, Remarks at "The Center for Constitutional Governance Annual Supreme Court Preview: Looking Forward After the Election" (Nov. 12, 2020).

litigant can show discriminatory motive.[6] These moves have affected the "play-in-the-joints" strategy employed by the Court in cases involving state aid for religious purposes or to religious institutions, squeezing the space "between what the Establishment Clause permits and the Free Exercise Clause compels."[7]

Free Exercise Clause cases often involve a generally applicable state scheme that precludes religious organizations from receiving state benefits, grants, or contracts in order to avoid Establishment Clause complications. When evaluating the potential discriminatory motive of a state benefit program, the Justices invoke history, both to situate the case within a lineage of alleged state religious discrimination and to emphasize how their ruling actually aligns religious freedom jurisprudence with the Founders' intentions.

However, these descriptions of history are incomplete, ignoring the more recent developments of religion, race, and society in the United States since the Civil Rights Era, as well as the litigious organizations currently teeing up lawsuits. Interestingly, whilst omitting the relevant history of school vouchers, school choice, and the alliance between religious liberty groups and school segregationists, these opinions simultaneously reflect a specific understanding of religion and religious freedom that was carefully crafted by Christian Right[8] and Christian nationalist[9] social

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[6] *Id.* In *Smith*, the Court did not require the government to grant religious believer's exemptions from facially neutral and generally applicable regulations of conduct, even if these regulations burdened religious believers. Employment Div. v. Smith, 494 U.S. 872, 878 (1990).

[7] Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2019 (2017).

[8] Jeffrey Haynes, *"Donald Trump, the Christian Right and COVID-19: The Politics of Religious Freedom,"* 10 LAWS 1, 2 (2021) (defining 'Christian Right' "as a generic label for politically active Christian conservatives, many of whom are white" and stating that "[m]any among the Christian Right are ethnically 'white,' descended for the most part from north-west European Protestants who historically migrated to the USA." Additionally, "[t]he Christian Right is not a party, movement or organisation. It is a loose partnership of individuals and groups united in the view that America's Christian foundations are fatally undermined by secularization and that it is crucial to reverse this trend to return to the founding (Christian) values of America.").

[9] Joshua T. Davis & Samuel L. Perry, *"White Christian Nationalism and Relative Political Tolerance for Racists"* 68(3) SOCIAL PROBLEMS 513, 513-534 (defining Christian nationalism as "an ideology that idealizes and advocates a fusion of Christianity and American civic life."). For more, *see generally* ANDREW L. WHITEHEAD & SAMUEL L. PERRY, TAKING AMERICA BACK FOR GOD: CHRISTIAN NATIONALISM IN THE UNITED STATES (Oxford Univ. Press, 2020); John Chadwick, "Christian Nationalism Explained: An Interview with Rutgers Professor Joseph

movements and lawyers during that exact period and beyond. Put differently, the Justices often explicitly omit or dismiss history since the 1950s in their opinions and concurrences. Yet, these same writings are themselves infused with interpretations of religious freedom promoted by social movements, law firms, and other actors operating in the very historical period on which the Justices are silent.

This apparent paradox permeates the Court's recent decision in *Espinoza v. Montana Dept. of Revenue*. Through a brief analysis of the use, and misuse, of history in *Espinoza*, this Article demonstrates how conservative and Christian social movements and lawyers have effectively changed constitutional understandings about the relationship between the state and religion through cherry-picked history. In doing so, this Article unveils how the Court uses "history and tradition [to] serve[]…its 'ideological agenda.'"[10] Part One provides background for this claim, addressing history as a tool of judicial interpretation and legal use. It discusses the criticism of "law office history," particularly in religious clause cases. Part Two brings the historical discussion to *Espinoza*, focusing on Chief Justice Roberts' majority opinion and Justice Alito's concurrence.[11] Part Three presents the history the Justices conveniently exclude, that of Christian nationalism and public education since *Brown v. Board of Education*. This Part's "brief retelling"[12] includes a non-exhaustive discussion of the conservative and religious legal organizations and individuals who have built and maintained that flawed history.

Williams," Rutgers School of Arts and Sciences (2021) (detailing that Christian nationalists "insist that the United States was established as an explicitly Christian nation, and they believe that this close relationship between Christianity and the state needs to be protected—and in many respects restored—in order for the U.S. to fulfill its God-given destiny.").

[10] Benjamin Genshaft, *With History, All Things Are Secular: The Establishment Clause and the Use of History*, 52(2) CASE WESTERN L. REV. 573, 584 (2001).

[11] *Espinoza* spawned multiple writings, with five Justices writing separately in addition to Chief Justice Roberts' majority. Only the Chief Justices' majority and Justice Alito's concurrence are examined here Espinoza v. Montana Dep't of Revenue, 140 S. Ct. 2246, 2269 (2020).

[12] Espinoza v. Montana Dep't of Revenue, 140 S. Ct. 2246, 2269 (2020) (J. Alito, dissenting).

"History must be handmaiden, not rival, to justice."[13] The past structures the present and dictates the future.[14] History has the power to lubricate, or rust, the wheels of change.[15] By telling us where we have been, it creates and recreates the universe, affecting both how we are currently constituted and our potential to imagine what comes next.[16] Thus, it matters greatly what history we choose to be our teacher. Committing to a complete and faithful history "clarif[ies] and justif[ies] our commitments in the present," determining the contours of progressive possibility.[17]

PART ONE: HISTORY AND THE LAW

The American jurisprudential constitutional tradition is built on historical evaluation.[18] But, history as curated and developed by lawyers and judges veers sharply away from that of the historian. For lawyers and judges, history is not a pursuit of objectivity or completeness.[19] Quite the opposite – history is "another form of evidence or argumentation to support a desired legal result."[20] While inevitably producing imperfect and selective

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[13] Christopher L. Eisgruber, *The Living Hand of the Past: History and Constitutional Justice*, 65 FORDHAM L. REV. 1611, 1621 (1997).

[14] *See generally* MARTIN HEIDEGGER, BEING AND TIME (Oxford: Basil Blackwell, 1985).

[15] MICHEL-ROLPH TROUILLOT, SILENCING THE PAST: POWER AND PRODUCTION OF HISTORY 25 (Boston: Beacon Press, 2015) (detailing that "[t]racking power requires a richer view of historical production.").

[16] There are many reasons to discount Hegelian historicism, especially his argument that history has a direction and a desired end. Yet, even with these critiques, the central relationship in Hegel's work is between history and freedom, a pairing that transcends Hegel's linear account of history as a series of world-historical events marching towards full freedom. *See generally,* GEORG WILHELM FRIEDRICH HEGEL, REASON IN HISTORY, A GENERAL INTRODUCTION TO THE PHILOSOPHY OF HISTORY (N.Y.: Liberal Arts Press,1953); GEORGE WILHELM FRIEDRICH HEGEL, THE PHILOSOPHY OF HISTORY (N.Y. Dover Publications, 1956); GEORGE WILHELM FRIEDRICH HEGEL, PHENOMENOLOGY OF SPIRIT (Oxford: Clarendon Press, 1977).

[17] EDDIE S. GLAUDE, BEGIN AGAIN: JAMES BALDWIN'S AMERICA AND ITS URGENT LESSONS FOR OUR OWN 78-79 (Crown: New York, 2021).

[18] *See* Alfred Kelly, *Clio and the Court: An Illicit Love Affair*, 1965, S. Ct. Rev. 119 (1965).

[19] Cass R. Sunstein, *The Idea of a Useable Past*, 95 COLUM. L. REV. 601, 601 (1995) (stating that "[b]ut human beings see history through their own filters, including their own assumptions, and the result is, inevitably, something other than unmediated access to what happened before.").

[20] Steven K. Green, *The Legal Ramifications of Christian Nationalism*, 26 ROGER WILLIAMS UNIV. L. REV. 437, 486 (2021).

accounts,[21] historians often acknowledge the impossibility of a complete or comprehensive historical record.[22] The methodology employed by the historical canon is, especially with reference to the peer review process, at least theoretically, oriented towards completeness and neutrality.[23] And when the history produced is inescapably incomplete and biased,[24] a historian should acknowledge how the gaps shape the historical account.[25]

Lawyers, on the other hand, engage in "law office history" motivated by advocacy and evidentiary burdens rather than any commitment to a faithful recounting of the past.[26] Their approach to history is not exploratory, but argumentative.[27] Legal history, in many ways, subscribes to Michel-Rolph Trouillot's theory of history as an overlap between process and narrative, where different categories of people with disparate stakes and varying proximity to the past determine its narrative course.[28] No version of history that originates from the lawyerly posture can approach objectivity. Historical production through a legalistic lens focuses on the power derived from constructing memory, a project lawyers fully understand.

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[21] This is not to say that history as produced by historians is not ideological or political. It absolutely is. But the discipline at least pretends – or tells itself – that it can be objective in a way that the legal approach cannot. For more on historicism as political power-broker, specifically its instrumentalization in various colonial projects, *see* DIPESH CHAKRABARTY, PROVINCIALIZING EUROPE: POSTCOLONIAL THOUGH AND HISTORICAL DIFFERENCE 7-10 (Princeton; Princeton Univ. Press, 2008).

[22] *See generally* R.G. COLLINGWOOD, THE IDEA OF HISTORY (Oxford; Oxford Univ. Press, 1994).

[23] Trouillot, *supra* n. 15, at 5-6 (comparing the positive tradition of history as a "scientific profession" with the constructivist perspective, which "think[s] of history as one fiction among others.").

[24] Certainly, all history is purposely built (rather than discovered) and who gets to tell the story of the past is inequitable. As Trouillot writes, "the production of historical narratives involves the uneven contribution of competing groups and individuals who have unequal access to the means for such production." *Id*. at xxiii; Additionally, "[h]istory is always produced in a specific historical context. Historical actors are also narrators, and vice versa." *Id*. at 22.

[25] E.g., *see* Michel-Rolph Trouillot on how to contend with historical gaps. "…[W[e learn how to identify that what appears to be consensus actually masks a history of conflicts; we learn that silences appear in the interstices of these conflicts between narrators, past and present." *Id*. at xii.

[26] Daniel L. Dreisbach, *A Lively and Fair Experiment: Religion and the American Constitutional Tradition*, 49 EMORY L.J. 233, 234 (2000).

[27] Sunstein, *supra* n. 19, at 603.

[28] *Id*. at 23.

The project of litigation-built history intends to set forward-looking precedent and is disinterested in the historian's idealistic dream of establishing a thorough account of the past.[29] Flawed historical interpretation reaches its apogee at the Supreme Court. As Alfred Kelly wrote in his seminal piece on law office history and constitutional history-making, "[t]he Court, in performing its self-assumed role as a constitutional historian, has been, if not a naked king, no better than a very ragged one."[30]

The rhetorical, legitimizing role played by historical references in judicial opinions compounds the danger of the legal use of history as cherry-picked evidence rather than background. "History legitimizes legal arguments and judicial decision-making by offering an aura of authority and objectivity."[31] Constitutional history, in particular, derives its authority from its association with the sacrosanct foundational document. Historical constitutional accounts ostensibly give insight into the original scope of justice and liberty as envisioned by the Founding Fathers. In history, then, constitutional promises condition constitutional progress, and "American popular sovereignty [is] reconciled with the justice-seeking Constitution."[32] However, devotion to history, especially judge- and lawyer-created, ushers in vulnerabilities. Definitionally, history is ambiguous. However, in the hands of judges who command authority in their decrees and in relation to the Constitution which engenders legitimacy by its very mention, "ambiguous historical record[s] may simply give judges new paths for their interpretative meanderings."[33]

Judges often elevate historical evidence that favors their desired conclusion and present it in monolithic constitutional language, shrouding their chosen history in the judiciary's legitimacy. The common law system, through institutional design factors like cross-citations and appeals to previous authority, reproduces judge and lawyer-made history until what was

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[29] Interestingly, this understanding of legal history corresponds with Heidegger's conception of the past as inherently future-looking. Any foray into the past is in service of the future. As Chakrabarty writes, "there is, in a sense, no 'desire for going back,' no 'pathological' nostalgia that is also not futural as well." Chakrabarty, *supra* n. 21, at 250; *see also,* Heidegger, *supra* n. 14.

[30] Kelly, *supra,* n. 18, at 155.

[31] Green, *supra* n. 20, at 486.

[32] Eisgruber, *supra* n. 13, at 1622.

[33] Jack N. Rakove, *Fidelity Through History (or Do It),* 65 FORDHAM L. REV. 1587, 1588 (1997).

originally a selective advocacy-oriented exploration into the past becomes sticky, undisputed constitutional record. As W.E.B. Du Bois wrote, history becomes "lies agreed upon."[34]

SECTION ONE – HISTORY AND THE RELIGIOUS CLAUSES

"No provision of the Constitution is more closely tied to or given content by its generating history than the religious clause of the First Amendment."[35] Absent a clear definition of religion and religious practice, courts evaluate sincerity of belief[36] and historical practices[37] when determining the presence of a Free Exercise or Establishment Clause violation. Additionally, historical evaluation polices who deserves religious protection. As the late Justice Scalia said, "interpretations of the Establishment Clause should comport with what history reveals was the contemporaneous understanding of its guarantees."[38] This perspective on history has had practical effects. In both *Marsh v. Chambers*[39] and *American Legion v. American Humanist Association*,[40] the Court used a history and tradition test to uphold religious practice and symbols.[41] Historical

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[34] W.E.B. DU BOIS, BLACK RECONSTRUCTION IN AMERICA, 711-714 (Free Press, 1999). Du Bois urges undertaking history as a project of truth-telling. As he writes, "[n]ations reel and stagger on their way; they make hideous mistakes; they commit frightful wrongs; they do great and beautiful things. And shall we not best guide humanity by telling the truth about all this, so far as the truth is ascertainable?". *Id*.

[35] Everson v. Board of Ed, 330 U.S. 1, 33-34 (1947).

[36] Courts have never defined religion since "[m]en may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others." United States v. Ballard, 322 U.S. 78, 86 (1944). Courts can, however, focus on the sincerity of a religious belief: "to decide whether the beliefs professed by a registrant are sincerely held and whether they are, in his own scheme of things, religious." United States v. Seeger, 13 L. Ed. 2d 733, 1965.

[37] *See* Lemon v. Kurtzman, 403 U.S. 602 (1971).

[38] Caroline Mala Corbin, *Justice Scalia, the Establishment Clause, and Christian Privilege*, 15 FIRST. AMEND. L. REV. 185, 190 (2017).

[39] Marsh v. Chambers, 462 U.S. 783 (1983) (in which the Court ruled that the Nebraska Legislature's chaplaincy practice does not violate the Establishment Clause).

[40] Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067 (where the Court found that neither the presence of a 32-foot-tall Latin cross memorial on public land nor the taxpayer-funded maintenance of that memorial violates the Establishment Clause).

[41] *Marsh*, 462 U.S. at 786 ("The opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country") and at 792 ("In light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening

usage overcomes legal principles and insulates otherwise violative government-sponsored religious practice.

The history-as-kingmaker paradigm encourages advocates before the Court to engage in law office history and selectively paint favorable historical pictures endorsing their desired outcome.[42] The question for judges goes beyond "[w]hat history should be referenced?"[43] to "whose history should be referenced?" The importance of establishing a historical record is evident from the *Marsh* case, where the central historical claim on the presence of prayer to open a school board meeting originated in a single amicus brief by the Family Research Council,[44] a fundamentalist Protestant organization and lobby.

In *Marsh*, a Nebraskan state legislator challenged the constitutionality of opening each legislative session with a prayer offering by a chaplain selected and compensated by the state.[45] Overturning lower court judgements, the Supreme Court, in an opinion written by Chief Justice Warren E. Burger, upheld the chaplaincy practice since it was "deeply embedded in the history and tradition of this country."[46] Chief Justice Burger supported his conclusion with the historical assertion that both the First Continental Congress and the First Congress – which codified the Bill of Rights – opened legislative sessions with a prayer led by a public funds-supported chaplain.[47]

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legislative sessions with prayer has become part of the fabric of our society."); *Am. Legion*, 139 S. Ct. at 2087 ("…in later cases, we have taken a more modest approach that focuses on the particular issue at hand and looks to history for guidance") and at 2089 ("That the cross originated as a Christian symbol and retains that meaning in many context does not change the fact that the symbol took on an added secular meaning when used in World War I memorials. Not only did the Bladensburg Cross begin with this meaning, but with the passage of time, it has acquired historical importance.").

[42] Andrew L. Seidel, *Bad History, Bad Opinions: How 'Law Office History' is Leading the Courts Astray on School Board Prayer and the First Amendment*, 12 NE. U. L. REV., 248, 252 (2020) (stating "law office history is definitionally self-interested and use to argue a point, not to expound historical truth.").

[43] Dreisbach, *supra* n. 26, at 233.

[44] Family Research Council, *"Vision and Mission Statements,"* https://www.frc.org/mission-statement.

[45] *Marsh*, 462 U.S. at 784-785.

[46] *Id.* at 786. Chief Justice Burger wrote that, "To invoke Divine guidance on a public body entrusted with making the laws is not, in these circumstances, an 'establishment' of religion or a step toward establishment; it is simply a tolerable acknowledgement of beliefs widely held among the people of this country." *Id.* at 792.

[47] *Id.* at 790.

All history is incomplete and subjective, but Chief Justice Burger's presentation of history is particularly flawed, emblematic of the pathologies of legalistic history.[48] Constitutional attorney Andrew Seidel characterizes Chief Justice Burger's history as "curious and problematic because when [the First Continental Congress] met, the colonies had not even declared independence from England, let alone written the Constitution that, by design, would separate state and church."[49] How, then, did the Supreme Court blindly cite a flawed history that has since informed multiple other decisions as well as the common understanding of historical religious practice?

Seidel traces this history back to a single paragraph in a then-rising third-year law student's article.[50] This paragraph is not the product of intensive historical inquiry by its author. Rather, it "repeatedly cites an amicus brief by the Family Research Council and regurgitates the historical sources cited in the brief."[51] The amicus brief, which "provides the original myth for the history of school board prayer,"[52] was written by a solo practitioner with no historical experience and a religious agenda for a case involving legislative prayer.[53]

Unfortunately, evocations of thin and ideologically motivated history exist beyond *Marsh*. In his plurality opinion on the issue of government aid to religious schools in *Mitchell v. Helms*, Justice Clarence Thomas based his historical arguments on a single amicus brief authored by the Becket Fund for Religious Liberty, a self-proclaimed non-profit public interest law firm focused on religious liberty.[54] Notably, Becket represented Hobby Lobby in *Burwell v. Hobby Lobby*, convincing the Court that privately held for-profit corporations can claim religious exemptions.[55]

History and tradition play a key role in the adjudication of religious clause cases. That history, carefully constructed by

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[48] Seidel, *supra* n. 42, at 305.
[49] *Id*. at 251.
[50] Marie Elizabeth Wicks, *Prayer Is Prologue: The Impact of Town of Greece on the Constitutionality of Deliberative Public Body Prayer at the Start of School Board Meetings*, 31 J.L. & POL. 1, 30–31 (2015).
[51] *Id.*; Seidel, *supra* n. 42, at 264.
[52] Seidel, *supra* n. 42, at 266-267.
[53] *Id*.
[54] For a full description of Becket, *see infra* Part 3.2.3.
[55] Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 736 (2014) (in which the Court held that 'the contraceptive mandate, as applied to closely held corporations, violates RFRA.").

advocates with clear ideological objectives, is reproduced without further examination by judges, stamping it with judicial legitimacy and codifying it into the socio-political and legal tradition. History appears legitimate, but is in fact another story spun towards an increasingly accommodationist and Christian perspective on religious liberty. *Espinoza*, in both the history it elevates and forgets, further continues this devilish practice.

PART TWO: *ESPINOZA V. MONTANA DEPARTMENT OF REVENUE*

In 2015, the Montana state legislature established a voucher-like school choice system that granted tax credits to those who donated to scholarship organizations which, in turn, awarded scholarships to selected students to be used at any qualified private school.[56] Upon the direction of the Montana legislature, the program had to comport with a "no-aid" clause in Montana's Constitution that bars the provision of government aid to sectarian schools.[57] Some refer to no-aid provisions as Blaine Amendments,[58] named after James F. Blaine who proposed a federal constitutional amendment to prohibit state funding for religious, and specifically Catholic, schools in the nineteenth century.[59]

To bring the voucher program into conformity with the Montana Constitution, the Montana Department of Revenue ("the Department") promulgated a rule ("Rule 1") that changed the definition of "qualified education provider" to omit any school "owned or controlled in whole or in part by any church, religious sect, or denomination," effectively barring families from using

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[56] *Espinoza,* 140 S. Ct. at 2251.

[57] *Id*.; In full, the no-aid provision reads, "Aid prohibited to sectarian schools. ... The legislature, counties, cities, towns, school districts, and public corporations shall not make any direct or indirect appropriation or payment from any public fund or monies, or any grant of lands or other property for any sectarian purpose or to aid any church, school, academy, seminary, college, university, or other literary or scientific institution, controlled in whole or in part by any church, sect, or denomination." Mont. Const., Art. X, § 6(1).

[58] Steven Green, *"Symposium: RIP state 'Blaine Amendments' – Espinoza and the 'no-aid' principle,"* SCOTUSBLOG.COM (June 30, 2020), https://www.scotusblog.com/2020/06/symposium-rip-state-blaine-amendments-espinoza-and-the-no-aid-principle/.

[59] *See generally* Steven K. Green, *The Blaine Amendment Reconsidered*, 36(1) AM. J. OF LEGAL HIST., 38 (1992). For a full history of the anti-Catholic origin of Blaine Amendments, and how they violate the Equal Protection Clause, *see* Toby Heytens, *School Choice and State Constitutions*, 86(1) VA. L. REV., 117 (2000).

scholarships at religious schools.[60] Three mothers brought suit in state court, claiming that Rule 1 was religiously discriminatory.[61]

The Montana Supreme Court invalidated the entire program, holding that it violated the state constitution's no-aid provision.[62] Citing the Department's lack of authority, the Court also ruled that Rule 1 was invalid.[63] The U.S. Supreme Court reversed, striking down the "no-aid" provision as violative of the Free Exercise Clause as it discriminated based on religious status.[64]

SECTION ONE – CHIEF JUSTICE JOHN ROBERTS' OPINION

The Chief's opinion compares the tax-credit scholarship program with the Missouri Scrap Tire Program at issue in *Trinity Lutheran*. Following the logic of his majority opinion in *Trinity Lutheran*, Chief Justice Roberts holds that the Montana scheme similarly "impose[d] special disabilities on the basis of religious status" and "condition[ed] the availability of benefits upon a recipient's willingness to surrender [their] religiously impelled status."[65]

Importantly, the Chief dismisses Montana's argument that the tax-credit scholarship program should be evaluated under the standard proposed in *Locke v. Davey*, rather than *Trinity Lutheran*.[66] *Locke* involved a Washington state scholarship scheme, in which scholarships could be used at both religious and nonreligious schools so long as they were not used by students to pursue devotional theology degrees.[67] Citing the state's substantial interest in not funding devotional degrees, the Court found that this program did not violate the Free Exercise Clause.[68]

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[60] *Espinoza*, 140 S. Ct at 2252.

[61] *Id.* The child of only one of the three petitioners had already received scholarships. The children of the other petitioners were eligible for scholarships, but alleged that Rule 1 prevented them from using the scholarship funds as they wished at a Christian school.

[62] *Id*. at 2253.

[63] *Id.*

[64] *Id*. at 2255. The Court followed the logic in *Trinity Lutheran* that "disqualifying otherwise eligible recipients from a public benefit 'solely because of their religious character' imposes "a penalty on the free exercise of religion that triggers the most exacting scrutiny." (quoting *Trinity Lutheran,* 137 S. Ct. at 2015).

[65] *Id*. at 2256 (quoting *Trinity Lutheran,* 137 S. Ct. at 2021-2022).

[66] *Id.* at 2257.

[67] *Locke*, 540 U.S. at 715.

[68] *Id.* at 725.

Chief Justice Roberts distinguishes *Espinoza* from *Locke* in two ways. Firstly, he says that the *Locke* regulation was much narrower as it only prohibited the funding of a type of instruction but left undisturbed the use of scholarships at religious schools more generally.[69] Secondly, the Chief argues that *Locke* "invoked a 'historic and substantial' state interest in not funding the training of clergy," for which no comparable interest existed in *Espinoza*.[70] In making this claim, the Chief rejects the argument that a tradition against state support for religious schools emerged in the second half of the 19th century. He argues that "such a development… cannot by itself establish an early American tradition."[71] Furthermore, for the Chief, even if this history were examined, the discriminatory, bigoted, and anti-Catholic history of the no-aid provision and the Blaine Amendment on which it was based do not support the finding of a historic and substantial state interest like that in *Locke*.[72]

SECTION TWO – JUSTICE SAMUEL ALITO'S CONCURRENCE

Justice Alito's concurrence centers on the history of no-aid provisions.[73] In his retelling of the history of the Blaine Amendment on which Montana's no-aid provision is based, Justice Alito highlights a record of anti-Catholic sentiment, its legitimation by powerful actors, the use of public education to instill Protestant values, and the current opposition of Catholic actors in Montana. As he states, "just as one cannot separate the Blaine Amendment from its context, [o]ne cannot separate the founding of the American common school and the strong nativist movement."[74]

Specifically, Justice Alito scrutinizes the language of the Blaine Amendment and its reproduction in modern no-aid

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[69] *Espinoza*, 140 S. Ct at 2257.
[70] *Id.* at 2258. "The State's interest in not funding the pursuit of devotional degrees is substantial and the exclusion of such funding places a relatively minor burden on Promise Scholars." *Locke*, 540 U.S. at 725.
[71] *Espinoza*, 140 S. Ct at 2259.
[72] *Id.* "The no-aid provisions of the 19th century hardly evince a tradition that should inform our understanding of the Free Exercise Clause."
[73] Justice Alito dissented from *Ramos v. Louisiana*, in which the Court found that the origin of non-unanimous jury verdicts in Louisiana and Oregon was relevant to a determination of constitutionality. Yet, he chose to follow that exact course here, acknowledging that, "…I lost, and *Ramos* is now precedent. If the original motivation for the laws mattered there, it certainly matters here." *Id.* at 2268 (J. Alito, concurring).
[74] *Id.* at 2271.

provisions. In comparison to the Court's examination of origin in *Ramos v. Louisiana*, Justice Alito writes that "there are stronger reasons for considering original motivations here…because…Montana's no-aid provision retains the bigoted code language used throughout state Blaine Amendments."[75] The original version of the Montana no-aid provision prohibited state appropriations "for 'any sectarian purpose' or 'to aid in the support of any school ... controlled in whole or in part by any church, sect or denomination whatever.'"[76]

Unspooling the history of the Blaine Amendment, Justice Alito demonstrates how the word "sect" was widely known to be code for "Catholic," and how the Blaine Amendment's proponents espoused nativist views to galvanize support for their efforts to marginalize American Catholics.[77] Montana's no-aid provision inherited this history of prejudice, with the continued presence of the words "sect" and "sectarian" still in the provision as "disquieting remnants."[78] Beyond the language and history of the no-aid provision, Justice Alito also focuses on the common-school movement, its hostility towards non-Protestant faith, and its lack of religious neutrality.[79] In his retelling, these factors motivated religious communities to start their own schools, for which they were responsible for funding and support.

Like the unanimous jury provisions in *Ramos*, for Justice Alito, Montana's no-aid provision is not saved from this bigoted history by virtue of its contemporary readoption for non-bigoted reasons.[80] The continued use of the word "sectarian" maintains the link between the Blaine Amendment motivation and the current statute. According to Justice Alito, none of Montana's actions or arguments can overcome this original sin.[81]

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[75] *Id*. at 2270 (J. Alito., concurring).
[76] *Id.* (quoting Mont. Const., Art. XI, § 8 (1889)).
[77] *Id.*
[78] *Id.* at 2273.
[79] *Id.* at 2271-2272.
[80] *Id.* at 2274.
[81] *Id.* Justice Alito hints that, even if Montana had done more to distance itself from the Blaine Amendment legacy, the Court may still have been justified in its broad ruling against no-aid provisions, stating that "even if Montana had done more to address its no-aid provision's past, that would of course do nothing to resolve the bias inherent in the Blaine Amendments among the 17 States, by respondents' count, that have not readopted or amended them since around the turn of the 20th century."

PART THREE: THE SUBSTANCE AND ARCHITECTS OF *ESPINOZA*'S OMITTED HISTORY

In *Espinoza*, Chief Justice Roberts employs history to demonstrate why the state's asserted interest in preventing an Establishment Clause violation is unjustified, while Justice Alito wields it to emphasize the unconstitutionality of no-aid provisions.[82] Yet, neither of the Justices' histories examine the circumstances surrounding the proliferation of school-choice programs, nor do they acknowledge the continuing movement to redefine the relationship between church and state. This omission leads to a decision that "further 'slights both [the Court's] precedents and [] history' and 'weakens this country's longstanding commitment to a separation of church and state beneficial to both.'"[83]

Moreover, even though Justice Alito links his opinion to the Court's decision in *Ramos v. Louisiana*, his presentation of history actually contradicts that decision's takeaways. There, the Court took as dispositive the racially discriminatory intent originally motivating Louisiana and Oregon's non-unanimous jury verdict system.[84] The state's later non-discriminatory readoption of the same jury rules did not, for the Court, adequately cleanse it of its original racist intent. For the *Ramos* Court, original motivation was enough.[85] The school-choice movement similarly emerged under racist conditions. Justice Alito's words in his *Espinoza* concurrence regarding the Blaine Amendments should carry the same power here; "[i]f the original motivation for the laws mattered [in *Ramos*], it certainly matters [in *Espinoza*].[86]

In both what it attends to and what it forgets, the discussion of history by Chief Justice Roberts and Justice Alito in *Espinoza*

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[82] Regarding the Blaine Amendment, Justice Alito states that the "history is well-known and has been recognized in opinions of [the] Court." *Id.* at 2269 (J. Alito, concurring).

[83] *Id.* at 2292 (J. Sotomayor, dissenting) (quoting *Trinity Lutheran*, 137 S. Ct. at 2027).

[84] Ramos v. Louisiana, 140 S. Ct. 1390 (2020).

[85] *Id.* at 1394 ("Why do Louisiana and Oregon allow nonunanimous convictions? Though it's hard to say why these laws persist, their origins are clear. Louisiana first endorsed nonunanimous verdicts for serious crimes at a constitutional convention in 1898. According to one committee chairman, the avowed purpose of that convention was to 'establish the supremacy of the white race,' and the resulting document included many of the trappings of the Jim Crow era: a poll tax, a combined literacy and property ownership test, and a grandfather clause that in practice exempted white residents from the most onerous of these requirements.").

[86] *Espinoza*, 140 S. Ct. at 2286 (J. Alito, concurring).

could alternatively be understood as a product of a myth-making enterprise. According to Roland Barthes, myths are convincing and powerful to the degree that they make history seem "natural."[87] Since "[m]yth is not defined by the object of its message, but by the way in which it utters this message," the selected preparation of the past – the way it is intentionally rendered and spoken – is a form of myth-making.[88] In choosing to "utter[] this message" absent a recognition of the full history, the Justices articulate a myth under the guise of presenting determinative history.[89] As this Part makes clear, the reason this myth is palatable and credible is because it is "made of material which has *already* been worked on," material that various legal actors have painstakingly and patiently concretized over decades.[90] Once it enjoys some level of legitimacy and enters into the judicial arena, the myth of this omitted history becomes self-reinforcing and, in many ways, unstoppable.

Section One briefly presents the consequential history excluded from Chief Justice Roberts and Justice Alito's writings. Section Two describes the legal actors working to craft the incomplete historical narrative platformed by the Justices. This Section specifically highlights the Alliance Defending Freedom ("ADF"), the American Center for Law & Justice ("ACLJ"), and the Becket Fund for Religious Liberty ("Becket") - three organizations with an outsized influence on what history is written, valued, and cited in Supreme Court opinions, and what is left behind.

SECTION ONE – OMITTED HISTORY

The history of public education since 1954 affirms Montana's argument that it has a historic and substantial interest in protecting public education through its actions.[91] In the landmark

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[87] Chakrabarty, *supra* n. 21, at ix. Barthes writes that "[a]ncient or not, mythology can only have an historical foundation, for myth is a type of speech chosen by history: it cannot possibly evolve from the 'nature' of things." ROLAND BARTHES, MYTHOLOGIES 108 (New York: Noonday Press, 1972).

[88] Barthes, *supra* n. 87, at 107. Scholar Rick Nutts argues that the reason the Religious Right's history diverges from that provided by historians is that its historical research "is governed by nostalgia, a yearning for a time understood to have been virtually paradisal." Rick Nutt, *How the Religious Right Views History – and Why*, 72 SOUNDINGS 527, 539-543 (1989).

[89] Barthes, *supra* n. 87, at 107 ("…there are formal limits to myth, there are no 'substantial ones. Everything, then, can be a myth? Yes, I believe this…").

[90] *Id*. at 108.

[91] Montana argued that that the case should be decided under *Locke v. Davey*, wherein the Court decided that Washington state's "decision not to fund devotional

1954 *Brown v. Board of Education* ruling, the Supreme Court held that segregated public schools are unconstitutional, ruling that "in the field of public education the doctrine of 'separate but equal' has no place."[92] To effectuate this mandate, the Court urged "deliberate speed."[93]

To avoid compliance with the Court's ruling in *Brown*, white southerners fled to newly minted private schools, many of which were religious. Between 1950 and 1958, private school enrollment in the South increased by more than 250,000 students. By 1965, this number had reached close to one million, with nearly all of these students being white.[94] Southern legislatures also enacted hundreds of laws to avoid school desegregation, including provisions that authorized the use of public resources to benefit private schools through voucher-like programs.[95] In these campaigns, the segregationist movement appropriated "parental choice" initiatives in education, previously recognized as legitimate by the Court.[96] Segregationists stated that their legislative schemes were premised on "the liberty of parents to direct the basic conditions under which their children shall be educated."[97] Advocates pushed for "schools of choice," that, like the euphemistic use of "sect" in the Blaine Amendment, were widely understood to be and were broadly known as white-only "segregation academies."[98]

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degrees did not penalize religious exercise or require anyone to choose between their faith and a 'government benefit,'" *Espinoza*, 140 S. Ct. at 2283 (J. Breyer, dissenting). In making this decision, the Court found that Washington's "position was consistent with the widely shared view, dating to the founding of the Republic, that taxpayer-supported religious indoctrination poses a threat to individual liberty," *Id*. In *Espinoza*, Montana similarly emphasized the founding-era policies that cut against state-supported clergy or state-supported religious education.

[92] Brown v. Bd. of Ed. of Topeka, Shawnee Cty., Kan., 347 U.S. 483, 495 (1954).

[93] Brown v. Bd. of Ed. of Topeka, Kan., 349 U.S. 294, 30, 99 L. Ed. 1083 (1955).

[94] Norman Dorsen, *Racial Discrimination in 'Private' Schools*, WM. & MARY L. REV. 39 (1967), 39, 46 (https://scholarship.law.wm.edu/wmlr/vol9/iss1/4/.).

[95] Steve Suitts, *Segregationists, Libertarians, and the Modern "School Choice" Movement*, SOUTHERN SPACES (June 4, 2019), https://southernspaces.org/2019/segregationists-libertarians-and-modern-school-choice-movement/. The most extreme of these tactics occurred in Little Rock, AK, where the Governor closed all public high schools for the 1958-1959 year to protest the desegregation mandate. Students learned remotely, mostly via television programming. *See* The Lost Year, https://thelostyear.com/.

[96] *See* Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary, 268 U.S. 510 (1925).

[97] Suitts, *supra* note 95.

[98] KATHERINE STEWART, THE POWER WORSHIPPERS: INSIDE THE DANGEROUS RISE OF RELIGIOUS NATIONALISM 62 (Bloomsburg Pub., 2019).

Most first-generation voucher programs were invalidated because of their obvious use of state funds to undermine state-mandated desegregation efforts.[99] In *Coffey v. State Educational Finance Commission*, the Court found that a statute providing state tuition grants to students attending private schools unconstitutionally supported private schools established as an alternative for white students avoiding desegregated public schools.[100] Yet, decades later, segregation academies persist.[101]

Despite these initial legal losses, the campaign to circumvent *Brown* remained potent because of alliances forged between various overlapping ideological camps – the segregation movement, free-market conservatives, and religious conservatives. For example, Milton Friedman's "The Role of Government in Education" mentioned school vouchers and school choice in its application of free-market principles to education.[102] The use of "choice" both obscured the underlying racial prejudice behind the use of public funds for private schools and aligned the movement with broader ideological conservative goals.[103]

"The dialectic between religion and whiteness is deeply rooted in the grand American racial narrative."[104] Consequently, the linkage between the post-*Brown* moment and the enduring assault

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[99] See Coffey v. State Educational Finance Commission, 296 F. Supp. 1389 (S.D. Miss. 1969); Griffin v. State Board of Education, 296 F. Supp. 1178 (E.D. Va. 1969); Poindexter v. Louisiana Financial Assistance Commission, 296 F. Supp. 686 (E.D. La. 1968).

[100] *See Coffey*, 296 F. Supp. 1389.

[101] Bracey Harris, *Reckoning with Mississippi's 'Segregation Academies'*, THE HECHINGER REPORT (Nov. 29, 2019). https://hechingerreport.org/reckoning-with-mississippis-segregation-academies/; Sarah Carr, *In Southern Towns, 'Segregation Academies' Are Still Going Strong*, THE ATLANTIC (Dec. 13, 2012), https://www.theatlantic.com/national/archive/2012/12/in-southern-towns-segregation-academies-are-still-going-strong/266207/. White alumni of segregation academies have recently started an initiative called "The Academy Stories" where they publish first-person accounts of their experiences. *See* The Academy Stories, https://www.theacademystories.com/.

[102] Suitts, *supra* note 95; *See* Leonard Ross & Richard Zeckhauser, *Education Vouchers: A Preliminary Report on Financing Education by Payments to Parents*, CTR. FOR THE STUDY OF PUB. POL. (1970), 451, 451-452. "For most of the period since Friedman wrote, private schooling, voucher plans, and "freedom of choice" have been before the public more as Confederate maneuvers than libertarian reforms."

[103] For example, according to Falwell, "the free-enterprise system is clearly outlined in the Book of Proverbs in the Bible. Jesus Christ made it clear that the work ethic was a part of His plan for man." Nutt, *supra* n. 88, at 532.

[104] Khalid A. Beydoun, *Faith in Whiteness: Free Exercise of Religion as Racial Expression*, 105 IOWA L. REV. 1475 (2020).

on the separation between church and state demands more attention. The Founders emphasized that this nation was not founded with any particular denomination.[105] Signed by President John Adams in 1796, the Treaty of Tripoli proclaims that "the government of the United States of America is not in any sense founded on the Christian Religion."[106] And yet, with its *Espinoza* ruling, the Court again strays from these principles.

Resonant with Christian nationalist desires for government to sponsor Christian prayers, symbols, and practices,[107] school vouchers were publicly championed as initiatives to bolster religion, especially at its intersection with racial politics.[108] The constitutional philosophy of the New Christian Right movement reframed the Constitution as the foundational document of a Christian nation.[109] Many Evangelical leaders in the South viewed integration as an affront to God. In a sermon responding to *Brown* entitled "Segregation or Integration: Which?" Reverend Jerry Falwell said "If Chief Justice Warren and his associates had known God's word and had desired to do the Lord's will, I am quite confident that the 1954 decision would never have been made."[110]

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[105] The Virginia Declaration of Rights of 1776 codified religious freedom: "all men are equally entitled to the free exercise of religion, according to the dictates of conscience." Virginia Declaration of Rights of 1776, art. XVI; Thomas C. Berg, *Religious Freedom and Nondiscrimination*, 50(1) LOY. U. CHI. L. J., 181-210 (2018); Thomas Jefferson, in 1821, expanded on this proclamation, saying that religious liberty was "meant to comprehend, within the mantle of its protection, the Jew and the Gentile, the Christian and Mahometan, the Hindoo, and Infidel of every denomination." *See* Thomas Jefferson, Autobiography (1821), reprinted in 1 Writings of Thomas Jefferson 66–67 (A. Lipscomb et al. eds., 1903).

[106] Art. 11, Treaty of Peace and Friendship, signed at Tripoli (Nov. 4, 1796).

[107] Caroline Mala Corbin, *The Supreme Court's Facilitation of White Christian Nationalism*, 71 ALA. L. REV. 833, 840 (2020).

[108] *Id*. at 842 (detailing that "mythical Christians are white" and "Christian nationalism is white America.").

[109] For example, Rev. Falwell asserted that "the goal of the framers of our Constitution was to govern the United States of America under God's laws," JERRY FALWELL, LISTEN, AMERICA! 53 (1980); Nutt, *supra* n. 88 at 530 ("Falwell and Robertson…[take] every mention of religion, God, and morality as evidence of Christian sentiment…Statements of faith by early national leaders, in conjunction with religious inscriptions in public buildings…, become proof for Falwell that the '…goal of the framers of our Constitution was to govern the United States of America under God's laws.'" *Id.*

[110] Max Blumenthal, "Agent of Intolerance," THE NATION (May 16, 2007) https://www.thenation.com/article/archive/agent-intolerance/. Falwell continued "The facilities should be separate. When God has drawn a line of distinction, we should not attempt to cross that line."

Similarly, in a radio sermon entitled, "Is Segregation Scriptural?" recorded six years after *Brown*, Reverend Bob Jones preached "If you are against segregation and against racial separation, then you are against God Almighty because He made racial separation in order to preserve the race…God is the author of segregation."[111]

After *Brown*, Christian Evangelical churches, like those of Rev. Falwell and Rev. Jones, opened private segregated schools as part of the larger movement to provide private alternatives for white children and families.[112] Yet, in 1970, the Internal Revenue Service ("IRS") began to threaten the tax-exempt status of religious organizations maintaining racially segregated schools.[113] In *Green v. Kennedy*, the District Court of Washington D.C. enjoined the application of IRS codes that provided tax-exemption to segregated schools.[114] This, plus the Supreme Court's ruling in *Green v . Connally*, effectively prohibited institutions with racially discriminatory admissions practices from enjoying tax-exempt status.[115] Although the Court's rulings did not explicitly discuss

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[111] Justin Taylor, *Is Segregation Scriptural? A Radio Address from Bob Jones on Easter of 1960*, THE GOSPEL COALITION (July 26, 2016), https://www.thegospelcoalition.org/blogs/evangelical-history/is-segregation-scriptural-a-radio-address-from-bob-jones-on-easter-of-1960/.

[112] Olatunde Johnson, *The Story of Bob Jones University v. United States: Race, Religion, and Congress' Extraordinary Acquiescence*, Pub. L. & Legal Theory Paper Group, Paper No. 10-229, 1, 5 (2010)
(stating "Yet racial beliefs and religion became intermingled in the mission and founding concepts of some of the religious schools, leading some observers to claim that "Christian schools and segregation academies are almost synonymous."); Andrew Gardner, *Racism and the Evolution of Protestant Support for Private Education*, BAPTIST NEWS GLOBAL (July 23, 2020), https://baptistnews.com/article/racism-and-the-evolution-of-protestant-support-for-private-education/#.X95Yg-lKhTa.

[113] Stewart, *supra* note 98, at 62.

[114] Green v. Kennedy, 309 F. Supp. 1127, 1137 (D.D.C 1970). "Where there is a showing, as here, that a dual system of segregated schools was established and maintained in the past either under State mandate or with substantial help from State involvement and support, the state and its school districts are under a present, continuing and affirmative duty to establish a 'unitary, nonracial system of public education * * * a system without a 'white' school and a 'Negro' school, but just schools." The D.C. Circuit court issued a permanent injunction against the IRS in *Green v. Connally*, preventing the IRS from "approving any application for tax exempt status…for any private school located in the State of Mississippi unless such private school makes a showing in support of its exemption application – (1) That the school has publicized the fact that it has a racially nondiscriminatory policy as to students…" 330 F. Supp. 1150, 1179-1180 (1971).

[115] The Supreme Court affirmed the D.C. Circuit Court's *Green v. Connally* ruling in *Coit v. Green*. 404 U.S. 997 (1971).

religious exemptions, they did mostly affect Southern Christian schools that tied their exercise of religious liberty with a perceived right to discriminate.[116]

Following this ruling and under President Richard Nixon's orders, the IRS forwarded a new policy that denied tax exemptions to all segregated schools.[117] Bob Jones University ("BJU") refused to follow the desegregation orders and, in a 1983 case, the Court held that the government could withhold tax exemptions to religious schools discriminating on the basis of race.[118] In the very same year, speaking about his proposed Educational Opportunity and Equity Act, the first proposed legislation for federal tax credits to finance private schools, President Ronald Reagan declared, "I don't think God should ever have been expelled from the classroom." [119]

The 1983 *Bob Jones* case was catalytic for the Religious Right since it "alerted the Christian school community about what could happen with government interference."[120] It embodied the twin threats of integration and secularism, both of which jeopardized the United States' allegedly white, Christian identity.[121] According to Paul Weyrich, chief strategist behind the New Right movement, "what got [the Religious Right] going as a political movement was the attempt on the part of the [IRS] to rescind the tax-exempt status of BJU because of its racially discriminatory policies."[122] For Rev. Falwell, this pursuit was existential. The

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[116] Haynes, *supra* n. 8, at 2.

[117] Randall Balmer, *The Real Origins of the Religious Right*, POLITICO (May 27, 2014), https://www.politico.com/magazine/story/2014/05/religious-right-real-origins-107133. This provision was upheld in Green v. Connally, 330 F. Supp. 1150 (D.D.C. 1971).

[118] *See* Bob Jones Univ. v. United States, 461 U.S. 574 (1983). At BJU, "All classes commence and close with prayer, and courses in religion are compulsory. Students and faculty are screened for adherence to certain religious precepts and may be expelled or dismissed for lack of allegiance to them. One of these beliefs is that God intended segregation of the races and that the Scriptures forbid interracial marriage. Accordingly, petitioner refuses to admit Negroes as students. On pain of expulsion students are prohibited from interracial dating, and petitioner believes that it would be impossible to enforce this prohibition absent the exclusion of Negroes." Bob Jones Univ. v. Simon, 416 U.S. 725, 734-735 (1974).

[119] Suitts, *supra* note 95.

[120] Balmer, *supra* note 117, quoting longtime Bob Jones University administrator Elsmer L. Rumminger.

[121] Jared A. Goldstein, *How the Constitution Became Christian*, 68 HASTINGS L.J. 250, 297-298 (2017).

[122] Randall Balmer, *Book Excerpt: 'Thy Kingdom Come,' Evangelical: Religious Right Has Distorted Faith*, NPR MORNING EDITION (June 23, 2006), https://www.npr.org/templates/story/story.php?storyId=5502785; Ilyse Hogue,

Moral Majority and the Religious Right were created "to fight a 'holy war' for the moral soul of America."[123] Reframing the school-choice cause as one based in religious freedom and Christian preservation, rather than racial segregation, Weyrich and Falwell used education as the vehicle through which to advance their larger project of altering the relationship between church and state in their favor.[124]

SECTION TWO – THE MYTH-MAKERS

Today, education remains the strategic contested space for the Religious Right.[125] Although no longer primarily focused on maintaining segregated schools, the broader objectives against government interference persist.[126] The torch is carried by organizations like the ADF, ACLJ, and Becket, which all bring cases

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"Becket Fund: Shadow Agents of the Religious Right," CATHOLICS FOR CHOICE (May 6, 2021) at https://www.catholicsforchoice.org/resource-library/becket-fund-shadow-agents-of-the-religious-right/ ("[a]fter waging a losing battle to maintain segregation in schools, the last hope of these extremists was to build a political machine to fuel their movement—its purpose to undercut any social progress that stood in their way. To accomplish this, they adopted a broader regressive policy agenda.").

[123] Haynes, *supra* n. 8, at 4.

[124] Balmer, *supra* note 117.

[125] One recent example is the debate (or perhaps, to describe it more aptly, the hysteria) over Critical Race Theory and the 1619 project. *See* Ibram X. Kendi, "There Is No Debate Over Critical Race Theory," THE ATLANTIC (July 9, 2021), https://www.theatlantic.com/ideas/archive/2021/07/opponents-critical-race-theory-are-arguing-themselves/619391/; Zack Beauchamp, "America's Largest Evangelical Denomination is at War With Itself," Vox (June 18, 2021), at https://www.vox.com/policy-and-politics/22538281/southern-baptist-convention-ed-litton-sex-abuse-critical-race-theory; Latasha Field, *"God, Parents, and the '1619 Project'"*, WALL STREET JOURNAL (Sept. 10, 2020), at https://www.wsj.com/articles/god-parents-and-the-1619-project-11599759170.

[126] Mask mandates are the latest government interference polemic. *See* Julia Carrie Wong, *"Masks Off: How US School Boards Became 'Perfect Battlegrounds' for Vicious Culture Wars,"* THE GUARDIAN (Aug. 24, 2021), https://www.theguardian.com/us-news/2021/aug/24/mask-mandates-covid-school-boards; Lindsay Whitehurst & Colleen Long, "Mask Debate Moves from School Boards to Courtrooms," AP (Aug. 28, 2021), at https://apnews.com/article/lifestyle-health-coronavirus-pandemic-school-boards-f59c2d847a8528b6ea472260f7998bd6; Marlene Lenthan, *"How School Board Meetings Have Become Emotional Battlegrounds for Debating Mask Mandates,"* ABC NEWS (Aug. 29, 2021), at https://abcnews.go.com/US/school-board-meetings-emotional-battlegrounds-debating-mask-mandates/story?id=79657733; Anya Kamenetz, "What It's Like to Be on the Front Lines of the School Board Culture War," NPR (Oct. 21, 2021), at https://www.npr.org/2021/10/21/1047334766/school-board-threats-race-masks-vaccines-protests-harassment.

to transform religious liberty doctrine and the place of religion in the United States.[127]

The conversion of school choice into an issue of religious liberty and government intrusion carries with it an alternate assumption about what freedom of religion means. The intellectual forefathers of the Religious Right movement, from whom the ADF, ACLJ, and Becket draw inspiration, rejected the notion that the United States was founded as a secular representative democracy.[128] Their political agenda "requires an historical demonstration that [they are] seeking to restore a lost relationship between…the Judeo-Christian tradition and the United States, a relationship believed to have existed from the earliest years of colonization."[129]

David Barton, the influential Christian historian behind the Museum of the Bible, perpetuates the common Christian Right myth that the United States was founded as a Christian nation.[130] Barton especially advocates for a return to the time before the Supreme Court's 1963 rulings in *Engels v. Vitale* and *School District of Abington v. Schempp*, when "God was kicked out of the classroom."[131]

Founder of the Christian Reconstruction and home-school movements, R.J. Rushdoony's theology is the backbone of the Christian Right movement. [132] Convinced that the United States

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[127] *See* Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603, (2020); Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012 (2017); Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014). ADF worked on *Espinoza* and the ACLJ submitted an amicus brief.

[128] Stewart, *supra* note 98, at 214. "The ADF has invoked key source texts of Christian Reconstructionism and its faculty at one time included…David Barton."

[129] Rick Nutt, *supra* n. 88, at 528. Evangelical theologian Francis Schaeffer states that the Founding Fathers "understood that they were founding the country upon the concept that goes back into the Judeo-Christian thinking…" *Id*. at 530.

[130] Stewart, *supra* note 98, 130-131. Barton is closely tied to many conservative politicians, including Ted Cruz. *Id*. at 141.

[131] *Id.* at 130. *See* Sch. Dist. of Abington Twp., Pa. v. Schempp, 374 U.S. 203 (1963)*;* Engel v. Vitale, 370 U.S. 421 (1962).

[132] Stewart, *supra* note 98, at 113; R.J. Rushdoony, *"Founder,"* CHALCEDON, https://chalcedon.edu/founder. Although not widely known, R.J. Rushdoony is considered the most influential of all modern theologians. As right-wing activist Howard Phillips says, "the whole Christian conservative political movement had its genesis in [Rushdoony]." Michael J. Vicar, "Reconstructing America: Religion, American Conservativism and the Political Theology of Rousas John Rushdoony (2010) (PhD dissertation, Ohio State University), 9-10). His works were required reading at both Pat Robertson and Jerry Falwell's Universities. Stewart, *supra* note 98, at 104. For more information on R.J. Rushdoony, *see* MICHAEL J. VICAR,

originated as "a development of Christian feudalism," he believed that "the Constitution was designed to perpetuate a Christian order," and developments like the Fourteenth Amendment were evidence of "the [C]ourt's recession from its conception of America as a Christian country."[133] Co-opting and destroying public education was central to Rushdoony's project. He lamented the expansion of "government schools," because of both his pro-slavery hostility to integration, and his belief that public schools were antithetical to his "biblical worldview" of a nation based on Christian law.[134] Gary North, a Rushdoony acolyte and advisor to former U.S. Representative Ron Paul, clearly laid out the corresponding strategy: "…we must use the doctrine of religious liberty to gain independence for Christian schools until we train up a generation of people who know that there is no religious neutrality, no neutral law, no neutral education, and no neutral civil government."[135]

1. THE ALLIANCE DEFENDING FREEDOM (ADF)

Through their lawsuits, the ADF, ACLJ, Becket, and others, reframe the very essence of the religious liberty doctrine to conform with these Christian nationalist principles. "In the effort to deny from whence we came" they, as James Baldwin put it, "make up a series of myths about it."[136] Founded in 1993 during the tidal wave of conservative Christian backlash to the gay-rights movement, the ADF has trained thousands of lawyers in its "Christ-centered" legal principles.[137] Receiving over $50 million a year in contributions from Christian and school-choice advocates like the former Secretary of Education Betsy DeVos, ADF sets the agenda for religious freedom litigation.[138] In 2017, then-Attorney General Jeff Sessions consulted

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"CHRISTIAN RECONSTRUCTION: R.J. RUSHDOONY AND AMERICAN CONSERVATISM" (Univ. of N.C. Press, 2015).

[133] Stewart, *supra* note 98 at 113, quoting R.J. Rushdoony, "The Nature of the American System" (Ross House Books, 1965), 8.

[134] *Id.* at 118. Conservative critics and Christian nationalists still refer to public schools as "government schools" today.

[135] Gary North, *The Intellectual Schizophrenia of the New Christian Right*, The Failure of the Am. Baptist Culture, 1 Christianity and Civilization, 25.

[136] James Baldwin, *National Press Club Speech*, CSPAN (Dec. 10, 1986) 14:57-15:03, available at https://www.c-span.org/video/?150875-1/world-made.

[137] Sarah Posner, *"The Christian Legal Army Behind "Masterpiece Cakeshop,"* THE NATION (Nov. 28, 2017), https://www.thenation.com/article/archive/the-christian-legal-army-behind-masterpiece-cakeshop/.

[138] *Id.*

with the group before releasing a memo on religious freedom.[139] Testimonials from ADF's Blackstone Fellows program give further evidence to the larger project to undermine secular law, with one Fellow praising the program's emphasis on the "orthodoxy of our Christendom in order to win back the rule of law."[140] Then-Montana Attorney General Tim Fox, who refused to defend the law at issue in *Espinoza*, was previously counsel for an ADF-allied Montana-based organization.[141]

2. THE AMERICAN CENTER FOR LAW & JUSTICE (ACLJ)

The ACLJ's legal strategy is similarly oriented. On its website, the ACLJ distorts Thomas Jefferson's initial invocation of the separation between church and state in his letter to the Danbury Baptists, arguing that the phrase was "not to keep religious influence out of culture or politics, but to protect the church from the coercive power of the government being used to regulate the internal affairs of local congregations."[142]

ACLJ's chief counsel, Jay Sekulow, was a top confidante in the President George W. Bush administration, advising on Supreme Court nominations that ostensibly included Chief Justice Roberts' and Justice Alito's, and then a top lawyer for President Donald Trump.[143] In a 1990 book, Sekulow said that "Satan's legions…have perverted the precious [First Amendment] guarantees."[144]

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[139] Pete Madden, *Jeff Sessions Consulted Christian Right Legal Group on Religious Freedom Memo,* ABC NEWS (Oct. 6, 2017), https://abcnews.go.com/Politics/jeff-sessions-consulted-christian-legal-group-religious-freedom/story?id=50336322. The memo included the provision that "a governmental action substantially burdens an exercise of religion … if it compels an act inconsistent with that observance or practice, or substantially pressures the adherent to modify such observance or practice."

[140] Blackstone Legal Fellowships, *Testimonies*, ALLIANCE DEFENDING FREEDOM, http://web.archive.org/web/20140311120021/http:/www.blackstonelegalfellowship.org/Internships/Testimonies (archived).

[141] Posner, *supra* note 137.

[142] ACLJ, *"Does the Separation of Church and State Really Exist?"* http://media.aclj.org/pdf/WP_Church-And-State.pdf.

[143] Jordan Gabian, *"Meet Jay Sekulow, the New Face of Trump's Legal Team,"* THE HILL (June 20, 2017), https://thehill.com/homenews/administration/338507-sekulow-becomes-face-of-trumps-legal-team/; Kyle Mantyla, *"Romney Successfully Wooing the Religious Right with Promises of Right Wing Judges,"* RIGHT WING WATCH (April 24, 2012), https://www.rightwingwatch.org/post/romney-successfully-wooing-the-religious-right-with-promises-of-right-wing-judges/.

[144] JAY SEKULOW, FROM INTIMIDATION TO VICTORY: REGAINING THE CHRISTIAN RIGHT TO SPEAK 156 (Creation House, 1990).

Justifying his legal strategy, he wrote that "[if] you really believe what the Bible says – that Jesus is the only way, that outside our comfortable church buildings there is a world full of drifting souls, doomed to hell – then you have to be aggressive."[145] Regarding education, Sekulow believes"[his] purpose [is] to spread the gospel on the new mission field that the Lord has opened – public high schools…Yes, the so-called 'wall of separation' between church and state has begun to crumble."[146]

In its *Espinoza* amicus brief, the ACLJ paints an existential picture of what is at stake for religious communities, stating that "[a] contrary ruling would authorize gratuitous hostility against those who choose religious entities for donation, education, services, etc."[147] Through these words, the ACLJ invokes the Moral Majority's scaremongering tactics, reframing the case's outcome in terms of a hyperbolic fear of perceived group threat and loss.[148]

The ACLJ urges the Court to rule for the plaintiffs to avoid a slippery slope into widespread, societal religious hostility and persecution. Additionally, the ACLJ's brief reflects the narrowing doctrinal space between the Establishment and Free Exercise Clauses, particularly the diminishing bandwidth the Court has to even examine the constitutionality of religious funding schemes. The ACLJ writes that "the 'essential' difference between religious and secular professions is *only visible to the theological* eye…the nonbeliever considers religious acts to be meaningless rituals…Only to the eyes of faith is the religious act 'essentially' different."[149] Therefore, when attending to a religious liberty issue, the Court must proceed carefully because it is institutionally ill-equipped to make determinations on faith.[150] Religious concerns cannot be properly judged by inherently secular institutions, of

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[145] *Id.* at 19.
[146] Stewart, *supra* note 98, at 222.
[147] Brief for the ACLJ as Amicus Curaie, p. 4, Espinoza v. Montana Dept. of Rev. 140 S. Ct. 2246 (continuing to argue that "[a] state or federal government could disallow deductions for charitable contributions only to religious charities. Use of public parks could be free except for church events. Tours of museums and state capitols could be free for all student groups except those from religious schools. A government transportation agency could allow free (and thus subsidized) use of express lanes by HOV vehicles except for buses carrying children to or from religious schools.").
[148] Goldstein, *supra* n. 121, at 266.
[149] ACLJ brief, *supra* n. 147, at 7.
[150] *Id.* ("Yet the federal and state courts are not equipped or even permitted to render such inherently religious assessments.").

which the Court is one. As such, any ruling that deleteriously impacts any religious act to any degree falls afoul of the constitutional requirements of Free Exercise.

The ACLJ's chosen historical and societal evidence elevate the menace of potential religious persecution, rather than religious interference or establishment. The ACLJ, in limiting the role the Court can play, minimizes both the Establishment Clause's historical necessity and foundational intention in favor of a wider grant of protection under the Free Exercise Clause, reflected in Chief Justice Roberts' opinion. In doing so, it fashions a strategy of religious jurisprudence strategically useful for entrepreneurial Christian nationalist actors and their interpretations of religious liberty.

3. THE BECKET FUND FOR RELIGIOUS LIBERTY (BECKET)

Becket supporters hail the non-profit legal organization with exaltations including "God's ACLU"[151] and "God's Rottweilers."[152] Founded in 1994 by Kevin J. "Seamus" Hasson, Becket is named after Thomas Becket, 12th century Chancellor of England and Archbishop of Canterbury.[153] Becket is a famous Catholic saint and martyr, killed by royal knights after a years-long argument with King Henry II of England over the proper division of power between the Crown and the Church.[154] The Becket Fund's summoning of Thomas Becket is purposeful; the organization fashions itself a Thomas Becket disciple, continuing his work of defending religious rights in the face of secular, government intrusion. In a 2012 speech accepting an award from the conservative Heritage Foundation, Hasson situated the Becket Fund's mission in Thomas Becket's tradition, stating, "[t]he fight is now between people who believe in something and people who believe in precisely nothing. They are nihilists, and this is a threat that is simply unprecedented…[w]e

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[151] Elizabeth Dias, "Meet the Lawyers Fighting for Religious Freedom Today Before the Supreme Court," TIME (Oct. 7, 2014), at https://time.com/3476109/becket-fund-supreme-court-prison-beard/, quoting Viet Dinh, former U.S. Assistant Attorney General. He continued to refer to Becket as "God's ACLU."

[152] Amelia Thomson-Deveaus, "God's Rottweilers," POLITICO (Oct. 5, 2014), at https://www.politico.com/magazine/story/2014/10/becket-fund-religious-conservatives-111468/.

[153] Michael David Knowles, "St. Thomas Becket," Britannica.com at https://www.britannica.com/biography/Saint-Thomas-Becket.

[154] *Id.*

are manning the believer's side of the barricades against the forces who believe in nothingness."[155]

Becket's power is derived from its impact litigation strategy. The non-profit purposely selects religious plaintiffs of all faith traditions with the objective of changing the law, establishing friendly precedent, and reframing the terms of the religious liberty debate. As part of this scheme, Becket only handles appellate-level cases, bolstering its potential to "shape the law."[156] Acutely aware that building precedent is a careful and delicate undertaking, Becket deliberately represents only those plaintiffs with claims that can advance the non-profit's ideological project – to essentially insulate religious plaintiffs and institutions from legal scrutiny. According to Hasson, Becket "turn[s] away fifteen cases for every one [taken],"[157] leading to a self-proclaimed 85% success rate.[158]

Becket played an instrumental role in two of the most important recent religious liberty cases. Becket co-represented the petitioners in the 2012 case *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, which asked whether the "ministerial exception" that grants religious institutions special rights in making employment decisions, applied to a teacher employed by a religious school but instructing in mostly secular matters.[159] The ministerial exception embodies the principle that all religious determinations must be made by believers, not secular government institutions.[160] In a unanimous ruling, the Supreme Court vastly expanded the ministerial exception's gambit, agreeing with Becket that any employee or teacher that engages in any level of religious

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[155] *"Defending Religious Liberty for All,"* THE HERITAGE FOUNDATION (July 2, 2012), at https://www.heritage.org/civil-society/report/defending-religious-liberty-all.

[156] "The mission of the Becket Fund is to shape the law, so that the broadest possible base of support for religious liberty can be generated by the American people and embodied in American law and court decisions," said William P. Mumma, the firm's current president and board chairman, quoted in Mark A. Kellner, *"The Law Firm Behind the Hobby Lobby Win,"* DESERET NEWS (June 30, 2014), at https://www.deseret.com/2014/6/30/20544071/the-law-firm-behind-the-hobby-lobby-win#lawyers-for-hobby-lobby-making-statement-outside-u-s-supreme-court-immediately-following-the-decision-from-left-emily-hardman-adele-kiem-angela-wu-asma-uddin-lori-windham-at-microphone-and-kristina-arriaga.

[157] *Id*.

[158] Becket Fund, "History," at https://www.becketlaw.org/about-us/history/.

[159] Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC, 565 U.S. 171, 180 (2012).

[160] In his opinion, Chief Justice Roberts recited historical support to justify the expansion of the ministerial exception. For some examples, *see Id*. at 182-185).

instruction is considered a "minister," and that government interference in the employment decisions made by religious institutions regarding "ministers" violates the Free Exercise Clause.[161] The *Hosanna-Tabor* ruling augments the category of what qualifies as a religious determination or religious activity. The Supreme Court has since further enlarged the definition of religious practice insulated from government interference.[162]

Becket won another key victory in 2014 in *Burwell v. Hobby Lobby*. Here, in an opinion written by Justice Alito, the Court ruled that corporations enjoy religious freedom rights and, as such, cannot be compelled to provide health-insurance coverage for contraception in violation of their sincerely held religious beliefs.[163] *Hobby Lobby* is often cited as justification by corporations seeking to discriminate both in regards to healthcare provision, but also more broadly in various sectors against LGBTQIA+ communities.[164]

Both of these triumphs provide insight into Becket's view of religious liberty and history. Although Becket represents itself as non-sectarian, and has successfully won cases for plaintiffs of assorted denominations, its intersection with conservative legal non-profits and actors recalls the alliance between free-market conservatives and religious activists.[165] For example, Leonard Leo, co-chairman of the Federalist Society and architect of the conservative legal judicial strategy, serves on Becket's Board.[166]

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[161] *Id*. at 197-198.

[162] One example is the Court's decision in Our Lady of Guadalupe Sch. v. Morrissey-Berry, decided in the same term as *Espinoza*. There, in an opinion written by Justice Alito, the Court determined that a teacher who teaches at a religious school, but does not have any religious credentials, ministerial training, or religious function, is still covered under the ministerial exception just by virtue of her employment at a religious institution. Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2066 (2020).

[163] *See* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014).

[164] In her dissent, Justice Ginsburg warned of *Hobby Lobby*'s impact, writing "The Court, I fear, has ventured into a minefield…" Hobby Lobby 573 U.S., at 771 (J. Ginsburg, dissenting).

[165] Ilyse Hogue states the overlapping project succinctly, writing "[w]ith the long game in mind, they began constructing a pipeline to funnel people willing to promote their extremist agenda into positions of power. Among this list of the willing was the Becket Fund—a legal organization that, under the guise of "religious liberty," would eventually be revealed as the force behind many efforts to attack reproductive freedom and other fundamental rights. Using religion to cloak a much more sinister agenda, this group has fought tooth and nail since its foundation to undermine the rights and freedoms we hold dear." Hogue, *supra* n. 122.

[166] Becket Fund, *"Board"*, https://www.becketlaw.org/about-us/board/.

Although only directly cited twice, Becket's fingerprints are all over Justice Alito's *Espinoza* concurrence.[167] Becket's *Espinoza* amicus brief details the discriminatory history of school funding that restricts the provision of funds to "sectarian" schools, as code for Catholics.[168] However, Becket's history-making endeavor can be traced back to the amicus brief it filed in *Mitchell v. Helms*, a school-funding predecessor case to *Espinoza*, described in Section One. Like Justice Alito's *Espinoza* concurrence, Justice Thomas' *Mitchell* opinion centered on the discriminatory history of Blaine Amendments.[169] The historical reference both implicitly and explicitly cited was that offered by Becket in its *Mitchell* amicus brief.[170] In *Espinoza*, Becket did not need to reproduce its full historical record, for that record had already jumped from the pages of an amicus brief into a prior Supreme Court opinion. Its history had already been made permanent, etched into stone as part of acknowledged jurisprudence on the page of a Supreme Court ruling.

The trickle-down effect of carefully selected history reframes the debate on religious liberty and on the relevant past. In short, in their recitations of the relevant history in *Espinoza*, Chief Justice Roberts and Justice Alito mention neither the evolution of private religious schools and the school-choice movement, nor the broader vision of religious liberty which they forwarded. "Apostles of forgetfulness," they fail to recognize the linkages between that history and the present project advanced by the ADF, the ACLJ, and Becket.[171]

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[167] *Espinoza*, 140 S. Ct. at 2268, 2271.

[168] Brief for the Becket Fund for Religious Liberty as Amicus Curaie, p. 15, Espinoza v. Montana Dept. of Rev. 140 S. Ct. 2246.

[169] Mitchell v. Helms. 530 U.S. 793, 828 (2000) ("Opposition to aid to 'sectarian' schools acquired prominence in the 1870's with Congress's consideration (and near passage) of the Blaine Amendment, which would have amended the Constitution to bar any aid to sectarian institutions. Consideration of the amendment arose at a time of pervasive hostility to the Catholic Church and to Catholics in general, and it was an open secret that 'sectarian' was code for 'Catholic.'").

[170] Brief for the Becket Fund for Religious Liberty as Amicus Curaie, p. 4-10, Mitchell v. Helms. 530 U.S. 793 (2000).

[171] DAVID BLIGHT, FREDERICK DOUGLASS: PROPHET OF FREEDOM 533 (Simon & Schuster, 2018).

CONCLUSION

In 2011, Pat Robertson said that the ACLJ "will be needed as never before" to protect against government hostility.[172] With Justice Barrett's ascent, the ACLJ, alongside the ADF and Becket, find a bench even less restrained in remaking religious liberty doctrine. The Roberts Court has already demonstrated an increased friendliness to religious plaintiffs, ruling in favor of religious organizations over 81% of the time.[173] In these judgements, the Court betrays a pro-Christian agenda, as it has purposely extended protections traditionally reserved for minority or non-mainstream religions to mainstream Christian denominations, overwhelmingly anointing Christian groups as victors.[174] Recognition of the full history of race, religion, and public funding is one way to insulate against these tendencies.

The Court's use of history in religious clause cases, both as evidentiary support and in terms of first-principles, will be tested again in in *Carson v. Makin* argued on December 8, 2021. In this case, the Justices face a question left open by *Espinoza*: does a state violate the Constitution when it operates a program that provides students with money to attend private schools but bars them from attending schools that provide religious instruction?[175] At oral argument, Michal Bindas, a senior attorney with the libertarian non-profit Institute for Justice who also appeared in the group's *Espinoza* litigation team, invoked *Espinoza* multiple times to support his contention that Maine was unconstitutionally discriminating against religious families.[176]

Additionally, both the ACLJ and Becket filed amicus briefs in the case, both of which cite *Espinoza*.[177] The Becket brief specifically mentions history, invoking *Espinoza*'s conclusion that "there is no 'historic and substantial' tradition against aiding

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[172] Right Wing Watch, *"Pat Robertson's Predictions for 2011*," YOUTUBE (Jan. 3, 2011), https://www.youtube.com/watch?v=lV1JodANwgI&feature=emb_title.

[173] Lee Epstein & Eric A. Posner, "The Roberts Court and the Transformation of Constitutional Protections for Religion: A Statistical Portrait" *forthcoming* in the S. CT. REV. (April 3, 2021), at 7.

[174] *Id*. at 8.

[175] Brief for Petitioners, at i, *Carson v. Makin* 20-1088.

[176] *See* Transcript of Oral Argument at 18:3 27:15, 34:19, 35:25, 36:19, 44:7, 112:15, 121:20, Carson v. Makin, No. 20-1088 (Dec. 8, 2021). Available at https://www.supremecourt.gov/oral_arguments/argument_transcripts/2021/20-1088_7kh7.pdf.

[177] *See* Brief for the Becket Fund for Religious Liberty as Amicus Curaie, Carson v. Makin 20-1088; Brief for the ACLJ as Amicus Curaie, p. Carson v. Makin 20-1088.

[religious] schools."[178] Worryingly, the brief goes even farther. According to Becket, not only does history not cut against aiding religious schools, "recent scholarship shows that for the founding generation, there was a historic and substantial tradition *for* aiding religious schools."[179] This is history being built in real-time; this is how history is made. If the Supreme Court invokes or cites this history, it will bless it as legitimate, further calcifying a cherry-picked, imaginative, and ideological reading of the past.

This Article does not pretend to present an all-encompassing account of a complex history – history is, by definition, iterative and expanding.[180] It is also "literally *present* in all we do."[181] But, that complexity does not, and cannot, disappear the segregationist threads in the school choice and religious private-school movement.[182] It also cannot distract from the real assault on the foundational separation between church and state.[183] The Court greatly misjudges *Espinoza's* impact. In *Espinoza*, it repeatedly states the importance of religious liberty without recognizing that its ruling promotes an understanding of the doctrine that is incompatible with that which the Founders imagined. Rather, the vision of religious liberty endorsed in *Espinoza* was crafted by institutional actors and social movements, originally as one way to resist integration. Since, it has become the primary vehicle through which public education is undermined, and religious liberty is

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[178] Becket Brief, *supra* n. 177, at 4.

[179] *Id*.

[180] Green, *supra* n. 20, at 488 (arguing that "[t]he final fallacy of law office history is the failure to recognize the indeterminacy and incompleteness of the historical records."); Additionally, "any exploration into history is selective, and all good accounts of history are interpretive." Collingwood, *supra* n. 20, at 218-219; Trouillot, *supra* n. 15, at 6 (stating that "[e]ach historical narrative renews a claim to truth.").

[181] James Baldwin, *The White Man's Guilt, in "The White Problem in America"*, EBONY 47, 47(Aug. 1965) (following the assertion that "…the great force of history comes from the fact that we carry it within us, are unconsciously controlled by it in many ways…").

[182] Especially because "the complexities of history deserve our respect." MARK DEWOLFE HOWE, THE GARDEN AND THE WILDERNESS: RELIGION AND GOVERNMENT IN AMERICAN CONSTITUTIONAL HISTORY 176 (Chicago; Univ. of Chi. Press, 1967).

[183] Justice Sotomayor's words in *Trinity Lutheran* carry here: "This case is about nothing less than the relationship between religious institutions and the civil government—that is, between church and state. The Court today profoundly changes that relationship…" 137 S. Ct. at 2027 (J., Sotomayor, dissenting).

expanded. It is clear – "the stakes are higher" than the Court's treatment would indicate.[184]

By reaching for a case it did not have to hear to declare a judgement it did not have to make, the *Espinoza* Court rewards the strategic build towards a weaker public system in favor of a stronger religious one.[185] In doing so, it took a massive and unnecessary step toward extinguishing any space left to "play-in-the-joints." The Court cannot argue ignorance – the incremental move towards a fundamentally different separation between church and state has been built creatively and competently. But that does not mean that the Court must continue to comply with this march towards an obliterated religious liberty doctrine.

Blinding itself to this important and relevant history, the Court invites consequences that will, unfortunately, reverberate much further than the facts presented in this Article, for "[m]isreadings of history become 'synthetic strands' woven 'into the tapestry of American history' and the corpus of American law."[186] Admitting imperfection and committing to a reexamination of its own historical record will not be an easy task in either ego or substance for the Court. Yet, a commitment to present and future justice necessitates truth-telling. No matter the "great pain and terror, the Supreme Court must 'enter[] into battle with [the] historical creation[s]' it has accepted and reproduced.[187] If not, it will continue to remake public understanding of religious liberty, not to bring it in conformity with foundational principles, but rather to further the destruction of the wall separating church and state.

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[184] *Id*; Trouillot, *supra* n. 15, at xiii, (describing that "[w]hat is at stake in pastness…is the future, the process of becoming.").

[185] Espinoza*,* 140 S. Ct. at 2292 (J., Sotomayor, dissenting). "The Court today makes this ruling, a ruling that does violence to historical standards of religious liberty, notwithstanding the fact that the three mothers originally brought an as-applied challenge to the tax credit scholarship program, a scheme invalidated by the Montana Supreme Court on state-law grounds."

[186] Dreisbach, *supra* n. 26, at 237, quoting Howe, *supra* n. 175.

[187] Baldwin, *supra* n. 181, at 47.